Supreme Court, U.S.
FILED
AUG 21 1998
OFFICE OF THE CLERK

No. 98-66

In The

Supreme Court of the United States

October Term, 1997

DENISE M. KENNEDY,

Petitioner,

v.

SCHOENBERG, FISHER & NEWMAN, LTD. AND ROBERT C. GOLDBERG,

Respondents.

On Petition For Writ Of Certiorari From The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR THIS COURT TO RESOLVE A CRITICAL QUESTION OF LAW AFFECTING THIS CASE AS WELL AS OTHER DISCRIMINATION CASES BROUGHT PURSUANT TO TITLE VII

The question presented by the petitioner asked this Court to define and/or clarify what constitutes direct evidence of discriminatory intent under Title VII of the Civil Rights Act. *(Pet. Br., p. i.)* The respondents take the petitioner's question a step further and ask, will the resolution of petitioner's question change the outcome of this case. *(Resp. Br., p. i.)* It is, of course, obvious that, should the Court rule the declarations set forth in the petition constitute direct evidence of discriminatory intent, that ruling would not only change the outcome of this case, but would also affect the outcome of the many pending and future discrimination cases brought in the federal district courts across the country. Thus, the question presented, it must be conceded, is of great importance not only for this case, but for the many other pending and future Title VII cases filed in the federal courts.

The petition also affords this Court the opportunity to reaffirm the maxim that the law places no greater evidentiary burden upon plaintiffs in Title VII cases than in any other civil cases. *See, e.g., United States Postal Service Bd. Of Governors v. Aikens,* 460 U.S. 711, 716, 103 S. Ct. 1478, 1482 (1983). The declarations made by Goldberg: *"If you were my wife, I would not want you working after having children"*, and that Kennedy *"should be home with her kids now, with her child now, that she shouldn't be working"* constitute an acknowledgment of discriminatory intent sufficient to create a triable issue of intentional discrimination. Moreover, as a practical matter, declarations like Goldberg's are the only truly direct evidence of discriminatory intent that will ever be available in these types of cases since intent to discriminate is a mental state and mind reading is not an accepted tool of judicial inquiry. *See Troupe v. May Department Stores Company,* 20 F.3d 734 (7th Cir. 1994). Accordingly, no greater evidentiary burden should

be imposed upon Title VII plaintiffs than that which is imposed upon parties in any other civil case.

II. THIS CASE PRESENTS THE COURT WITH THE OPPORTUNITY TO DEFINE AND/OR CLARIFY DIRECT EVIDENCE OF DISCRIMINATORY INTENT

One of the many analytical flaws contained in the respondents' brief is their assertion that this Court has already addressed the very question presented in the Petition for Writ of Certiorari. The respondents apparently believe that the "stray remarks" contained in some of the opinions in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), has risen to the level of the doctrine of "stray remarks" sanctioned and espoused by the full Court. *(Resp. Br. at pp. 4-7); contra Shager v. Upjohn Company*, 913 F.2d 398, 402 (7th Cir. 1990) (implicitly recognizing that the Supreme Court has yet to address this issue.)

This is not so. For had the respondents reviewed the Court's plurality decision in *Price Waterhouse* and the Petitioner's Writ of Certiorari, they would have learned that which is already known. That is, the plurality did not define, nor require, direct evidence of discriminatory intent, and Justice O'Connor's separate concurrence was written principally because of the plurality's failure to do so. *Price Waterhouse*, 490 U.S. at 277-78, 109 S. Ct. at 1805 ("[t]he plurality proceeds from the premise that the words 'because of' in the statute do not embody any causal requirement all all. Under my approach. . . . ").

From this faulty premise, the respondents arrive at the equally faulty conclusion that the definition of direct evidence of discriminatory intent already incorporates both a temporal and causal requirement. *(Resp. Br. at p. 5.)* The respondents would have this Court believe that a new rule of evidence emerged not of this Court's making, nor of Congress', but from a concurring opinion arising from a plurality decision, and grafted upon it were the requirements of time and cause. *Id.* It is the respondents' apparent confusion with the state of Title

VII case law that has prompted the very petition which is before the Court today. In other words, Goldberg's discriminatory declarations, coupled with this subsequent conduct, either does or does not constitute direct evidence of discriminatory intent, and that is for this Court to decide, not the respondents.

III. GOLDBERG'S DECLARATIONS CONSTITUTE DIRECT EVIDENCE OF DISCRIMINATORY INTENT

Assuming for the sake of this discussion that the evidentiary framework of Title VII embodies a temporal and causal requirement in the first instance, a requirement not found in the *Price Waterhouse* plurality opinion, (490 U.S. at 250, 109 S. Ct. at 1790-91), the temporal and causal requirements were met in this case. The causal requirement urged by Justice O'Connor in her concurring opinion held that "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status." *Price Waterhouse*, 490 U.S. at 278, 109 S. Ct. at 1805. This causal requirement can be demonstrated by use of direct evidence. *Id.*

However, by defining direct evidence as only that "evidence which if believed, proves the fact of discriminatory intent without inference or presumption" the Courts of Appeals, including the Seventh Circuit, raises the evidentiary burden placed upon Title VII plaintiffs to proof of an "admission" or a "smoking gun." *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989). The Seventh Circuit recognized this evidentiary burden when it stated in this case, "[d]irect evidence of discriminatory intent in pregnancy discrimination cases generally *is in the form of an admission by a supervisor or decision maker* that the employee was suspended because she was pregnant." *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 723 (7th Cir.

1988), *citing, Troupe v. May Department Stores Company*, 20 F.3d at 736 (7th Cir. 1994).[1]

This Court however, has never required evidence of discriminatory intent to rise to the level of "*admission*" before it is considered direct evidence. The most that can be said of *Price Waterhouse* is that this Court recognized the common sense proposition that a discriminatory slur is not always and in all cases proof of discriminatory intent in and of itself. *Price Waterhouse v. Hopkins*, 490 U.S. at 277, 198 S. Ct. at 1805. Consequently, somewhere between an "admission" and a "stray remark" lies the definition or meaning of direct evidence of discriminatory intent, and this petition provides a perfect vehicle for the Court's analysis of this critical evidentiary question.

A. GOLDBERG'S DECLARATIONS WERE TEMPORALLY RELATED TO THE ADVERSE EMPLOYMENT DECISION

Respondents go to extreme lengths to explain what Goldberg meant by his statements that Kennedy *"should be home with her kids now, with her child now, that she shouldn't be working."* The respondents' need to place Goldberg's statements in an innocent context is so great that they infer from a presumption Goldberg's state of mind when he made the comments. *(Resp. Br. at p. 1, fn. 3.)* It is odd indeed that the respondents here resort to rank inference and presumption when speculating what Goldberg's statements do not mean, rather than examining the discriminatory declarations at face value.[2]

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[1] Here, the respondents attack the petitioner for asserting that the Court of Appeals, including the Seventh Circuit, generally hold that evidence of discriminatory intent must rise to the level of an "admission" or "smoking gun" before it will be deemed "direct evidence" sufficient to shift the burden of proof. *(Resp. Br. at p. 4, fn. 6.)* These attacks, generally labeled as "disingenous", are a sloppy substitute for the proper review of Seventh Circuit case law on this issue.

[2] While the Seventh Circuit has previously noted that mind reading is not an accepted tool of judicial inquiry, the respondents believe it is an acceptable tool of persuasive legal argument. *(Resp. Br. at pp. 1, 2, fn. 3.)*

The petitioner, on the other hand, asks this Court to look at the plain words of Goldberg's declarations. Goldberg said: *"If you were my wife, I would not want you working after having children" and "Kennedy should be at home with her kids now, with her child now, that she shouldn't be working."* A fair reading of those statements, without resort to inference, presumption, or mind reading, is that Kennedy should be at home with her child now, she shouldn't be working.

Indeed, it was not mere coincidence that soon after giving birth to her child, Goldberg made good on his views of Kennedy working and having children. The evidence revealed that soon after Kennedy returned to work from her maternity leave, i.e., after giving birth to her child, Goldberg made sure that she was not working and was at home with her child. *(R. 100, Ex. 25.)* For it was Goldberg who insisted, in his October 23, 1992, memorandum delivered to all firm partners, that *he* intended to review the Kennedy matter fully and offer his recommendation at the firm's partner meeting on November 2, 1992. *(R. 82, Ex. 16(b).)*[3] Moreover, it was at this same partners meeting that Kennedy's employment with the firm was terminated. *(R. 100, Ex. 3, p. 49.)* Goldberg's statements themselves, coupled with his conduct of implementing his declared hostility toward

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Cf. Troupe v. May Department Stores Company, 20 F.3d 734 (7th Cir. 1994).

[3] The respondents incorrectly take the petitioner to task asserting that there is no evidence in the record before the District Court or the Seventh Circuit to support the statement that Kennedy's position with the firm was placed on the firm's November 2, 1992 partners meeting agenda by Goldberg. *(Resp. Br. at p. 2, fn. 4.)* The respondents need only examine Exhibit 16(b) of their own exhibits filed with the District Court and the Seventh Circuit to discover the evidentiary support for this correct statement of the factual record. *(R. 82, Ex. 16(b).)* In his October 23, 1992 "memorandum" to all firm partners, Goldberg wrote: "At our November 2, partners meeting, I intend to review the matter [Kennedy] fully with you and offer my recommendation." *Id.* The matter was reviewed, Kennedy was fired, and only the respondents' attorneys are unclear as to the nature of Goldberg's recommendation.

working women who have children, satisfies any temporal requirement of direct evidence of discriminatory intent.

B. GOLDBERG IS THE DE FACTO DECISION-MAKER AND THUS, HIS DECLARATIONS ARE CAUSALLY RELATED TO THE DECISION TO TERMINATE

The respondents' analysis is strained to the breaking point when they suggest that Goldberg was not the decisionmaker with respect to Kennedy's termination. *(Resp. Br. at 2.)* It is of course true that the partners of the firm collectively acted to terminate Kennedy's employment at the November 2, 1992 partners meeting. It is also true that Goldberg, a partner of the firm, declared that he himself would take the Kennedy matter up with his fellow partners at the November 2, 1992 meeting and offer his recommendation. What is untrue is the assertion that Goldberg was not the decisonmaker.

On November 2, 1992, Goldberg attended the partners meeting, Kennedy's future employment with the firm was discussed, Kennedy was terminated from the firm, Goldberg was, in the words of his fellow partner, "unusually quiet", and Goldberg himself triggered the review. *(R. 100, Ex. 3, pp. 49, 72; R. 100, Ex. 2, p. 78.)* The respondents however, insist that Goldberg was not the decisionmaker.

To this end, the respondents mistakenly assume that the phrase "decisionmaker" as employed by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989) must be Goldberg himself or the petitioner's case cannot survive summary judgment. *(Resp. Br. at p. 6.)* The respondents' argument misses the mark.

The decisionmaker in *Price Waterhouse* was the firm's Policy Board. However, the Policy Board relied upon the recommendation of the firm's Admission's Committee, who in turn relied upon information they received from the partners as a whole. A number of those partners, the court found, had considered Hopkins' failure to conform to gender stereotypes when it decided to place her partnership candidacy on hold. Justice O'Connor summed up the evidence as follows:

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was told by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid.

Price Waterhouse v. Hopkins, 490 U.S. at 272-73, 109 S. Ct. at 1802.

Similarly, SFN, acting through its partner Goldberg, terminated Kennedy's employment from the firm at the November 2, 1992 partners meeting. Goldberg had previously acknowledged his discriminatory intent that Kennedy shouldn't be working after having a child and that he would not want her working after having children.

One month after giving birth to her child, Kennedy was requested by one of the firm's and Goldberg's most important clients, to attend its annual association meeting. (R. 100, Ex. 9, pp. 23, 24-46.) Goldberg did not invite Kennedy to the meeting even though Kennedy had attended and worked at these meetings for the previous three years because, as Goldberg previously stated, "Kennedy shouldn't be working after having children" she "should be at home with her kids now."

Four months after giving birth to her child, and one day after returning from her maternity leave, Goldberg placed Kennedy on probation (R. 100, Ex. 25.) Placing Kennedy on probation immediately after returning from maternity leave was one more affirmative acknowledgment of Goldberg's discriminatory intent because "Kennedy shouldn't be working after having children" she "should be at home with her child now."

Less than two months after Kennedy returned from maternity leave, Goldberg informed his partners that he would review the Kennedy matter fully with them at the November 2, 1992 partners meeting and offer his recommendation to them. (R. 82, Ex. 16(b).) That night, on November 2, 1992, the firm terminated Kennedy's employment. (R. 100, Ex. 3, p. 49.)

Goldberg made good on his acknowledged discriminatory intent because Kennedy was now not working and at home with her child.

To paraphrase Justice O'Connor, it was as if Denise Kennedy were sitting in the hall outside the room the night the partnership decision was made to terminate her. As the partners filed in to consider her future with the firm, she heard Goldberg repeat his previous discriminatory remarks regarding whether Kennedy should be working after having children. As the partners left the room, she was told by one privy to the decisionmaking process that Goldberg placed her future with the firm on the partnership agenda, told his fellow partners that he would make a recommendation to them, the partners then fired her, and Goldberg was "unusually quiet" at the meeting. One would be hard pressed to think of a situation where such direct evidence of intentional discrimination did not create a triable issue of fact.

C. GOLDBERG'S DISCRIMINATORY INTENT IS ATTRIBUTABLE TO THE PARTNERSHIP

As previously noted, Goldberg insisted that Kennedy's future with the firm be discussed at the November 2, 1992 partners meeting. Kennedy's fate with the firm was then perfunctorily discussed by Goldberg's fellow partners. Kennedy was terminated at the partners meeting. Goldberg attended the partners meeting, abstained from voting, and was, in the words of his fellow partners, "unusually quiet."

Only the respondents' attorneys are unclear of Goldberg's recommendation and whether the law requires Goldberg alone be the decisionmaker before liability can attach. The respondents contend that the individual partners, as the de jure decisionmaker, somehow shields Goldberg and the partnership from the wrong committed by Goldberg. The respondents are obviously unclear of the common law rule of respondeat superior and are equally unclear of Seventh Circuit precedent holding that where a corporate committee acts as a conduit of the employee's prejudice – his cat's paw – the innocence of the

committee members cannot shield the corporation from liability. *Shager v. Upjohn Company*, 913 F.2d 398 (7th Cir. 1990).

The common law rule is that an employer is liable for the intentional acts of its employees committed in furtherance of their employment. *Burlington Industries, Inc. v. Ellerth*, ___ U.S. ___, 118 S. Ct. 2257, 1998 WL 336326 (1998). This rule is applicable to statutory torts such as those proscribed by Title VII of the Civil Rights Act. *Id.* (*an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee).*

Moreover, simply because Goldberg alone did not make the decision to terminate Kennedy, that fact does not absolve him or the partnership from liability under Title VII. Where the facts show that the decision to terminate was tainted by Goldberg's prejudice towards Kennedy, the partnership itself cannot be set-up by the respondents' attorney as a clever liability shield to protect Goldberg. If the partnership acted as a conduit of Goldberg's prejudice, i.e., his cat's paw, the innocence of its members would neither spare Goldberg nor the partnership from liability under Title VII. *Cf. Shager v. Upjohn Company*, 913 F.2d 398, 405 (7th Cir. 1990).

Here, the partnership's decision to terminate Kennedy was certainly triggered and tainted by Goldberg's prejudice against Kennedy. Goldberg not only set up Kennedy to fail by placing her on "probation" one day after she returned from maternity leave, he also influenced the partnership's decision by portraying Kennedy's performance in the worst possible light. In other words, Goldberg's influence was decisive on the issue. *See Shager v. Upjohn Company*, 913 F.2d 398, 405 (7th Cir. 1990).

The evidence further demonstrated that Goldberg himself instigated Kennedy's termination when he informed his fellow partners that he intended to review the Kennedy matter with them at the November 2, 1992 partners' meeting and offer his recommendation. That night, the partners perfunctorily reviewed the matter, terminated Kennedy, offered a male law

school graduate a position with the firm,[4] and no one recalls Goldberg's recommendation because he was "unusually quiet" at this particular meeting. Thus, the partnership itself was simply Goldberg's paw, and that paw is as inseparable from the body of the cat as Goldberg is as inseparable from the body partnership.

CONCLUSION

In sum, the evidence in this case is not unlike the evidence presented in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). It is noteworthy that in *Price Waterhouse*, this Court's plurality held that such evidence was indeed direct evidence of discriminatory intent. 490 U.S. at 277, 109 S. Ct. at 1805 (*O'Connor, J. concurring opinion*). Here, based upon unsettled definitions of direct evidence, the Seventh Circuit held that the evidence presented in this case neither constituted direct or circumstantial evidence of intentional discrimination so as to avoid summary judgment. *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.2d at 723 (7th Cir. 1998). Consequently, this case presents this Court with the opportunity to define and/or clarify this important evidentiary question. It is for these reasons, that the Petitioner respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully submitted,

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[4] The respondents also claim that Kennedy never "performed litigation work with the firm." *(Resp. Br. at p. 3, fn. 4.)* The evidence contained in the trial court record as well as in the record before the Seventh Circuit Court of Appeals revealed that Kennedy had indeed performed litigation work for the firm. *(R. 100, Ex. 3, p. 55; Ex. 33.)*